STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA UNION OF SAFETY EMPLOYEES, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF FOOD AND AGRICULTURE), Respondent.	Case No. SA-CE-1291-S PERB Decision No. 1473-S January 31, 2002

Appearances: Linda M. Kelly, Legal Counsel, for California Union of Safety Employees; State of California (Department of Personnel Administration) by Gail T. Onodera, Labor Relations Counsel, for State of California (Department of Food and Agriculture).

Before Amador, Baker and Whitehead, Members.

DECISION

BAKER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the California Union of Safety Employees (CAUSE) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the State of California (Department of Food and Agriculture) (State) violated the Ralph C. Dills Act (Dills Act)[1] when it unilaterally transferred work performed by Brand Inspectors out of State Bargaining Unit 7.

After review of the entire record in this matter, the Board reverses the Board agent's dismissal and remands the case to the PERB General Counsel's office for further investigation and processing consistent with this decision.

[1] The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

BACKGROUND

CAUSE's unfair practice charge alleged the following:

The Brand Inspector civil service classification is included within State Bargaining Unit 7 which is exclusively represented by CAUSE. Brand Inspectors perform functions including livestock hide and brand inspection in various counties throughout the State.

On August 7, 2000, CAUSE Labor Representative Jimmy D. Southard (Southard) met with the Department of Food and Agriculture's Chief, Bureau of Livestock Identification, Glen Van Schaack (Van Schaack) and Department Labor Relations Officer, Paula Lewis (Lewis). Southard noted that the job title "AI Brand Inspector" was included in the 1999 Brand Inspector Directory and he inquired as to the status of AI Brand Inspectors. Van Schaack explained that those positions were filled by Agricultural Technicians on a part-time, seasonal basis. Van Schaack advised that the Agricultural Technicians assisted the Brand Inspectors, but they did not do the Brand Inspector's job. The Agricultural Technician classification is not included in State Bargaining Unit 7.

In late October 2000, CAUSE received a copy of an L/S Bulletin Supplement, dated October 24, 2000, which was issued by the Bureau of Livestock Identification. The bulletin announced a job opportunity for an Agricultural Technician I position in San Luis Obispo County. Attached to the bulletin was a job announcement for a Brand Inspector position in Kern County.

In subsequent discussions with Lewis, CAUSE was advised that Van Schaack intended to abolish the current Brand Inspector list. The incumbent Agricultural Technicians would then be temporarily appointed as Brand Inspectors until a new list was established. The

Agricultural Technicians would have to successfully complete the Brand Inspector examination and be placed on the new list to remain in their positions.

On February 8, 2001, Lewis notified CAUSE that Van Schaack had decided not to abolish the Brand Inspector list and there would be no conversion of Agricultural Technicians to Brand Inspectors. At that time, CAUSE requested that the State discontinue removing work from the unit by using Agricultural Technicians to do the work assigned to the Brand Inspector classification.

On February 28, 2001, CAUSE was informed that the State was auditing the Agricultural Technician positions to verify that they were not doing Brand Inspector work.

As of April 3, 2001, four more Agricultural Technician positions had been advertised. However, the charge alleged that there were 73 candidates remaining on the Brand Inspector list who could perform this work.

The State Personnel Board (SPB) job specification for Agricultural Technician (Seasonal) includes the following duties:

> . . . assist in hide and brand inspection work and livestock identification; assist in inspecting cattle and horses for proof of ownership; issue inspection certificates; keep records of work done; prepare reports and complete forms; complete and maintain appropriate field notes and other documentation; and perform certificate or other related data entry.

CAUSE and the State are parties to a memorandum of understanding effective July 1, 1999 through June 30, 2001. Article 20, the Entire Agreement clause, provides for arbitration of disputes involving changes to subjects within the scope of negotiations. Article 20. B states, in pertinent part:

> The parties recognize that during the term of this Contract it may be necessary for the State to make changes in areas within the scope of negotiations. Where the State finds it necessary to make

> such changes, the State shall notify CAUSE of the proposed change thirty (30) days prior to its proposed implementation.
>
> The parties shall undertake negotiations regarding the impact of such changes on the employees in Unit 7, when all three (3) of the following exists:
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> 1. Where such changes would affect the working conditions of a majority of Unit 7 employees by classification in a department.
>
> 2. Where the subject matter of the change is within the scope of representation pursuant to the Ralph C. Dills Act.
>
> 3. Where CAUSE requests to negotiate with the State.
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> Any agreement resulting from such negotiations shall be executed in writing and shall become an addendum to this Contract. If the parties are in disagreement as to whether a proposed change is subject to this Subsection, such disagreement may be submitted to the arbitration procedure for resolution. The arbitrator's decision shall be binding.

Article 20.1 A of the Memorandum of Understanding (MOU) states, in pertinent part:

> Except as provided in this Contract, it is agreed and understood that each party to this Contract voluntarily waives its right to negotiate with respect to any matter raised in negotiations or covered by this Contract, for the duration of the Contract.

DISCUSSION

In reviewing an appeal from a Board agent's dismissal for failure to state a prima facie case, the Board assumes that the essential facts alleged in the unfair practice charge are true. (San Juan Unified School District (1977) EERB Decision No. 12.[2])

Dills Act section 3514.5(a)(2) states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the

[2] Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

> parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore), PERB held that section 3541.5(a)(2) of the Educational Employment Relations Act (EERA)[3], which contains language identical to Dills Act section 3514.5(a)(2), established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Regulation 32620(b)(5)[4] also requires the investigating Board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

The Board agent's dismissal of the instant charge was based solely upon her conclusion that the charge must be deferred to arbitration under Lake Elsinore. She found that because transferring work performed by Brand Inspectors out of the bargaining unit was not included in the parties' contract and was unilaterally done, the dispute as to whether the State has made a change in policy which is subject to bargaining is subject to arbitration under Article 20.1.B.

Deferral to Arbitration - Lake Elsinore

Lake Elsinore was erroneously decided. In overruling Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a (Dry Creek) and its progeny, the Board compared the statutory framework of EERA to the National Labor Relations Act (NLRA)[5] and

[3] EERA is codified at Government Code section 3540 et seq.

[4] PERB's regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB's regulations and the statutes administered by the Board may be found at www.perb.ca.gov.

[5] 29 USC section 151 et seq.

concluded that EERA section 3541.5 did not "essentially codify" the National Labor Relations Board (NLRB) pre-arbitration policy.[6]

Several portions of the statute were not considered in the Board's analysis in Lake Elsinore. The express words of these sections are fatal to the validity of the Board's conclusions in that case. Section 3541.5 did essentially codify the NLRB's deferral policy as articulated in Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] (Collyer). A return in part to the Board's Dry Creek pre-arbitration deferral policy is mandated by EERA section 3541.5.[7]

Below is the statutory language from EERA that concerns the pre-arbitration deferral issue.[8] Underlined are four portions of the statute which were not addressed by the Board in Lake Elsinore. EERA section 3541.5 provides, in pertinent part:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

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[6] Although Lake Elsinore has been the Board's rule since 1987 -- that doesn't make it correct. The Board notes that "It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them." (International Union (UAW) v. NLRB (D.C. Cir. 1972) 459 F.2d 1329, 1341 [79 LRRM 2332].) It is unfortunate that the explanation for the "departure" is left for this decision. There is no doubt that the departure from precedent occurred when the Board drafted Lake Elsinore.

[7] At the time Dry Creek was decided, the Board treated deferral as an affirmative defense which could be waived. This issue is not squarely before the Board and the Board therefore does not overrule the portion of Lake Elsinore which discusses the jurisdictional nature of Section 3541.5.

[8] The present case before the Board concerns the Dills Act. Dills Act section 3514.5(a) contains language identical to EERA 3541.5(a). The Board's rule in Lake Elsinore was developed under EERA, but is applicable to the Dills Act because of the identical language of the two sections.

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
>
> (2) Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.
>
> (b) The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter.
> (Emphasis added.)

Clearly, the section read in its entirety contemplates a decision on the merits, not the "deferral to a brick wall" policy promulgated in Lake Elsinore. As evidenced by the underlined sections, the legislation contemplates a charging party having a forum either in an arbitration or in a hearing before PERB.

EERA section 3541.5(a)(2) prevents PERB from issuing a complaint against conduct also prohibited by the provisions of an agreement until the grievance machinery is exhausted "either by settlement or arbitration." If a decision is not reached on the merits, it is not an

arbitration of the dispute. The bar on PERB issuing a complaint on a matter also prohibited by the contract is not present if the grievance machinery will not result in a binding arbitration.

Under EERA section 3541(a)(2), the Board shall not defer when the charging party demonstrates that resort to contract grievance procedure would be "futile." The dictionary defines "futile" as "having no useful result; ineffectual; vain." (The American Heritage Dict., New College Edition (1980).) Deferring to a contractual grievance procedure where the employer can assert a procedural defense of untimeliness as justification for refusing to participate in an arbitration on the merits of the dispute renders the grievance procedure futile. What could be less useful than filing an untimely grievance which will not generate a response on the merits?

Futility has been recognized by the Board as a legitimate reason not to defer a case. In State of California (Department of Parks and Recreation) (1995) PERB Decision No. 1125-S, the Board found:

> The clear intent of Section 3514.5(a) is that this Board defers to the contractual resolution of disputes where such is available, and falls within the parameters of that section. Also clear is the Legislature's intent that when such resolution is not available, and resort to it would be futile, PERB is to issue a complaint and resolve the matter. [9]

Application of the Lake Elsinore rule frequently resulted in cases being dismissed and deferred to arbitration where there was little if any likelihood of the case being heard by an arbitrator on its merits. This resulted from the fact that a charge would be dismissed and deferred without any requirement that the respondent employer waive its contract-based procedural defenses to the grievance. After the charge was dismissed, a charging party which

[9] Futility was demonstrated in this case by charging party employees who were unable to arbitrate their dispute because their union would not take the case to arbitration.

then filed its grievance and attempted to pursue it to arbitration was met with contract-based defenses such as the grievance statute of limitations. As a result, the dispute was never heard on its merits. Such a situation demonstrates futility.

The Board in Lake Elsinore correctly pointed out differences between EERA and the NLRA. It is true that there is no statutory proscription or deferral provision under the NLRA. Although the NLRA does not contain a statutory deferral provision, such a policy has developed through decisions of the NLRB.

The NLRB defers to grievance-arbitration machinery by requiring its exhaustion when an unfair practice allegation is also covered by the parties collective bargaining agreement. (Collyer.) This deferral occurs under Collyer only when all parties indicate a willingness to arbitrate. The NLRB refuses to defer where the employer is not willing to waive the procedural defense that a grievance was not timely filed. (See e.g., Johnson-Bateman Co. (1989) 295 NLRB 180 [131 LRRM 1393]; Hotel Roanoke (1989) 293 NLRB 182 [132 LRRM 1229]; Southern Florida Hotel & Motel Association (1979) 245 NLRB 561 [102 LRRM 1578]; Pilot Freight Carriers, Inc. (1976) 224 NLRB 341 [92 LRRM 1338].)

The question before the Board is whether Section 3541.5 codifies Collyer or whether it adopts a different standard. The Board's Dry Creek decision found Section 3541.5 did codify Collyer. The Board's Lake Elsinore decision found it did not, with the result that if the grievance machinery covers a matter at issue, PERB must defer, even if the matter will not be decided on the merits. The most reasonable reading of Section 3541.5 is that it does reflect the policy set forth in Collyer. In short, the Board's decision in Dry Creek must have been correct or Section 3541.5 would look substantially different than it does.

The key transitory sentence in the Lake Elsinore reads:

> Unlike the NLRA, under EERA, where a contract provides for binding grievance arbitration, it is elevated to a basic, fundamental and required component of the collective bargaining process.

This sentence bridges two thoughts providing: (1) "the NLRB guidelines are different from EERA" and, (2) "the Legislature did not essentially codify Collyer." This Board speculates that this transition sentence means that under EERA, the grievance-machinery is the exclusive means to resolve a dispute covered by an MOU, therefore even if a grievant has missed the timelines, that grievant cannot bring a pre-arbitration unfair practice charge. This is the essence of the holding in Lake Elsinore. However, if the Legislature meant to say this, it would have said in Section 3541.5, PERB is prevented "from issuing a complaint against conduct also prohibited by the provisions of an agreement" followed by an exception for post-arbitration review. The futility exception would be absent.

Nothing in EERA or the Dills Act evidences the Legislature's intent to shorten PERB's statute of limitations for alleged violations from the statutory six months contained in each act to the time limits contained in the parties' collective bargaining agreement grievance machinery. In the case of the State Bargaining Unit 7 contract, the statute of limitations to contest conduct constituting both an unfair practice and a contractual violation would be shortened from the statutory six months contained in the Dills Act to 21 days contained in the State Bargaining Unit 7 contract.

The Board in Lake Elsinore stated that "the Legislature did not 'essentially codify' the Collyer requirements" and that there is "absent even the suggestion in the language of Section 3541.5, any other provision in EERA, or in its legislative history of an intent of the Legislature to codify Collyer." (Lake Elsinore, at p. 31.) We disagree.

EERA is in the main derived from the NLRA. The following excerpt from the California Supreme Court describes, in part, the origin of EERA:

> In 1972, following the first major state employee strike, the Legislature created the Assembly Advisory Council on Public Employee Relations, chaired by UCLA Professor Benjamin Aaron, to formulate recommendations 'for establishing an appropriate framework within which disputes can be settled between public jurisdictions and their employees.' (Assem. Res. No. 51 (1972 Reg. Sess).) In its 1973 report the Advisory Council recommended the enactment of a comprehensive state law, modeled on the National Labor Relations Act, which would afford formal collective bargaining rights to all public employees.
>
> The Legislature, however, was unable to agree on a comprehensive bill covering all public employees and decided instead to draft separate collective bargaining statutes directed to the specific needs and problems of different categories of public entities. In line with this approach, the Legislature in 1975 first enacted the Educational Employment Relations Act (EERA) (Stats 1975, ch. 961, § 2, p. 2247, codified in § 3540 et seq.); EERA repealed the Winton Act, established formal negotiating rights for public school employees, and created the Educational Employment Relations Board, an expert, quasi-judicial administrative agency modeled after the National Labor Relations Board, to enforce the act.
> (Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487]; emphasis added.)

The "Aaron Commission" report (Report) described above by the Supreme Court in its entirety supports the proposition that the Legislature intended to follow the NLRA in many areas. The introduction provides that:

> Although recognizing that there are important differences between the public and the private sectors, the Advisory Council has concluded that there are equally important similarities. It has not hesitated, therefore, to recommend that certain practices and procedures under the National Labor Relations Act, which have been tested for almost 40 years, be incorporated in a proposed new statute covering employer-employee relations in the government service in this State, included in this Report as Appendix A.
> (Cal. State Assem. Advisory Council on Pub. Emp. Rel. (1973) pp. 3-4.)

The Report reflects a preference that disputes that are both arguable violations of the statute and of a collective bargaining agreement be resolved through the agreement's grievance machinery. One exception to this policy was if resort to the grievance procedure would be futile:

> For example, if an employee can show that the exclusive bargaining agent is unable or unwilling to prosecute the grievance fairly or adequately, the employee should not be required to exhaust the contract procedures before filing an unfair practice charge with the Board.
>
> In all other cases, however, in which the act complained of is both a contract violation and an unfair practice, we recommend that if the collective agreement also includes a grievance procedure, under which a grievance based on the alleged unfair practice can be finally resolved, the Board should be forbidden to issue a complaint based on such an unfair practice unless and until the charging party exhausts the procedures of the collective agreement.
> (Cal. State Assem. Advisory Council on Pub. Emp. Rel. (1973) pp. 52-53; emphasis added.)

In 1978, Reginald Alleyne, Professor of Law, UCLA, and chairperson of this Board's predecessor, the EERB, commented specifically upon the origin of Section 3541.5(a) in a symposium piece published in the Santa Clara Law Review:

> Where the NLRA is silent and decisions of the NLRB and the courts provide judicial standards not found in the text of the NLRA, the California Legislature has in some instances adopted the non-statutory decisional law fashioned by the NLRB.[10]
> (Alleyne, A Symposium Introduction: The Special Value of Settlements in Educational Employment Relations Act Proceedings (1978) 18 Santa Clara L.Rev. 853, 856.)

[10] "The NLRB defers to grievance-arbitration procedures by requiring their exhaustion when an unfair practice allegation is also covered by the terms of a collective bargaining agreement. [Collyer.] The policy has no express basis in the NLRA. . . . The EERA contains what might be described as a statutory Collyer doctrine. [See EERA sec. 3541.5(a)] (West Supp. 1978)."

Review of the language of EERA Section 3541.5(a) and the legislative history makes it clear the Legislature intended to codify the NLRB's pre-arbitration deferral policy as articulated in Collyer. On that basis Lake Elsinore is incorrect and must be overruled. This overruling is based on the Dills Act dispute before us and therefore based on Dills Act Section 3514.5. This overruling does no harm to the preference which exists in California that disputes be resolved through the parties' mutually agreed upon grievance arbitration procedures. It merely ensures a forum for those disputes also constituting an unfair practice if the employer is unwilling to waive procedural defenses in the parties' contract and arbitrate disputes. As discussed above, this ruling appropriately returns PERB decisional law back into conformance with the NLRB's policy and decisions.

Does the Instant Charge State a Prima Facie Case?

Under the scope and definition of the series section, SPB's class specification indicates that Agricultural Technicians perform "hide and brand inspection" and "livestock identification." If the SPB class specification ended there, the Board would dismiss the charge based upon the "overlapping duties" test discussed in Eureka City Schools (1985) PERB Decision No. 481 (Eureka). However, under the definition of series section, the class specification reads that incumbents "assist in hide and brand inspection work and livestock identification." (Emphasis added.) As the word "assist" modifies these duties, further investigation of the charge is warranted.

The Board agent did not dismiss the charge based upon Eureka and the "overlapping duties" test. She dismissed the charge based solely upon Lake Elsinore. Accordingly, it is appropriate to remand for further investigation of CAUSE's allegation that the State has transferred the full range of Brand Inspector duties out of the bargaining unit.

As discussed above, it is uncertain whether the charge states a prima facie case. The Board agent can dismiss the complaint if she determines through investigation that a prima facie case has not been made. If she finds a prima facie case has been made, she can then determine whether the State is willing to proceed to arbitration and waive any contractual time limits or other procedural defenses for filing a grievance under the State Bargaining Unit 7 agreement.

ORDER

The Board REVERSES the Board agent's dismissal of the unfair practice charge in Case No. SA-CE-1291-S and REMANDS the case to the PERB General Counsel's office for further investigation and processing consistent with this Decision.

Members Amador and Whitehead joined in this Decision.